A REVIEW OF THE LAW OF SAFE-DEPOSIT COMPANIES.

THE business of conducting public safe-deposit vaults is a comparatively new one in this country, the first of these institutions having been established but about thirty years ago. It was a natural development of the custom that formerly existed among banks of gratuitously according space in their vaults to customers having valuables for which they desired unusual protection.

As soon as vaults were established by incorporated companies as separate institutions, the companies, in offering to the public the protection to be obtained from them, assumed toward their patrons distinct relations and liabilities peculiar to the business from its nature. It has been necessary that these relations and liabilities should be defined and established at law, and the constantly increasing extent of the business and the importance of its position being recognized, it becomes a matter worthy of attention to consider what these are as interpreted by the courts. While the number of cases that have come before them in which safe-deposit companies are primarily involved is singularly small, those adjudicated have at the same time made clear the leading principles applicable to the business.

The important points to be considered may be stated as follows: —

I. The legal relation between the company and its depositors.
II. The nature and extent of the liability of the company.
III. The position and duty of the company in case of legal proceedings against the property of a depositor.
IV. The relation between depositors having a community of interest in a safe.

I. *The Legal Relation between the Company and its Depositors.*

This resembles in certain respects two species of relation recognized by law, — those of landlord and tenant and bailor and bailee.

The resemblance to the first exists merely in form, however, suggested by the execution of the contract for hiring of the safe in the shape of a lease. In fact, there can be no relation of land-

lord and tenant between them for two reasons: first, because the contract has nothing to do with real estate. This is shown by the exactly analogous case of an agreement for board and lodging with a designation of the particular rooms to be occupied. In such a case it was held that "the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires, he cannot maintain ejectment, and while he remains the hotel-keeper cannot get his pay by distraining as for rent in arears." Wilson *v.* Martin, 1 Denio, 602; White *v.* Maynard, 111 Mass. 250.[1] The second reason is found in the agreement on the part of the company, either expressed in the contract or implied from the nature of the business, to guard the safe. This agreement fully establishes between the parties the relation of bailor and bailee, and it is this that is recognized by the courts as their legal relation.

In the case of Roberts *v.* The Stuyvesant Safe-Deposit Company (123 N. Y. 57), where the point was specifically passed upon, this is distinctly stated by the court to be the relation between the parties. In defining the liability of the company under it, the court cites the case of Jones *v.* Morgan (90 N. Y. 4). The latter case very aptly illustrates the contract relations and liabilities of the company, from the fact that the nature of the contract upon which action was brought is so entirely similar to that of the one existing between a safe-deposit company and its depositors. It is interesting, therefore, to consider it in detail.

The defendant owned a building in the city of New York. Under an agreement with the plaintiff, who desired to store for safe-keeping certain household furniture, a space was allotted to her in said building, and the defendant assured her that her goods would be safe and would be guarded day and night. The allotted space was enclosed by wooden partitions with a door, upon which were two locks, the key of one of which was kept by the plaintiff. Most of the property was stolen by those in charge of the building. In an action to recover damages, it was held that the contract between the plaintiff and the defendant was one of bailment; that the defendant was liable as warehouseman, and was bound to exercise

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[1] In the last particular, in the case of a safe-deposit company, the mode of procedure against the property of a depositor for arrears of rent is regulated in some States by statute. N. Y., L. 1875, c. 613, art. 15, as amend. 1886, c. 498; Mass., L. 1887, c. 89.

ordinary care and prudence. The defendant contended that the relations between himself and the plaintiff were those of landlord and tenant, and that he was not responsible for property placed in the space leased. This contention was not sustained, on the ground that, when he agreed to guard the space leased, and assured the plaintiff that her property would be safe, he rendered himself liable as bailee. The court, in their opinion by Earl, J., said: —

> "It is a species of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the key. . . . He may keep the key, but the company, [even] without special contract to that effect, would be held to at least ordinary care in keeping the deposit; and the duty of such care would arise from the nature of the business it was carrying on, and the obligation to discharge it would be implied from the relation between the parties."

II. *The Nature and Extent of the Liability of the Company.*

It is in its character of bailee that the company meets its liability for negligence. In general, the extent of this is measured by the degree of deviation from the care required of the ordinary bailee or depositary for hire, which is the care that a "prudent and intelligent" man would exercise in regard to his own property under similar circumstances. There are two leading cases in which the liability of the company for negligence is considered, and understanding of the nature of the company's responsibility cannot better be had than through an abstract of them.

The first is that of the Safe-Deposit Company of Pittsburgh *v.* Pollock (85 Penn. State, 391), where the company contracted with a depositor to "keep a constant and adequate guard and watch over and upon the safe" rented by him. A number of bonds deposited therein were found to be missing. The jury found that the depositor put them in the safe, and did not remove them therefrom. There was no evidence that the vault or the safe had been broken, or that the lock had been tampered with. These facts being unquestioned, and the bonds having been taken from the safe, it necessarily followed that it had been opened with a key suited to the lock. The fact that the bonds were taken under these circumstances was evidence that the company had not kept "a constant and adequate guard and watch over and upon the safe," as by its agreement it was bound to do. It was held from these facts that the manner in which the bonds were undoubtedly taken threw upon

the company the necessity of making some explanation for the absence of the bonds, and that the question as to whether or not the company was guilty of negligence was properly left to the jury.

The other case is that of Roberts *v.* The Stuyvesant Safe-Deposit Company (123 N. Y. 57), previously referred to. There property was taken from the safe of a depositor in the vault of the company by officers acting under a search warrant. The description in the warrant of the property sought for did not sufficiently correspond with the property found in the safe to establish its identity as the property in question. Nevertheless, the officers removed it. It was held that the taking of the property under such circumstances was a trespass, which should have been prevented, if possible, by the officers of the company; or they should have used legal means to regain possession of it.

The court stated the rule establishing the duty of the company as follows: —

"When property in the custody of a bailee for hire is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was."

It is appropriate to advert here to the rule of evidence applied in the case of the Safe-Deposit Company of Pittsburgh *v.* Pollock, to the effect that, in cases against safe-deposit companies for damages on account of negligence, the burden of proof is on the plaintiff, unless there is *prima facie* evidence of negligence on the part of the defendant, calling for explanation from him. This follows the general rule, as stated in Edwards on Bailments, Art. 399, thus: "It rests with the party alleging a fact by way of maintaining or defending an action to establish it by evidence."

What constitutes *prima facie* evidence is thus given in the same paragraph: "The bailor makes a *prima facie* case when he shows such loss or damage to the chattel as ordinarily does not happen when the care which the law requires in the particular kind of bail-

ment is exercised." The doctrine is followed in Arnot *v.* Branconier, 14 Mo. App. 431, and Collins *v.* Bennett, 46 N. Y. 490.

It is also to be noted from the case of Safe-Deposit Company *v.* Pollock, that the question as to whether or not there has been negligence is for the jury.

III. *The Position and Duty of the Company in Case of Legal Proceedings against the Property of a Depositor.*

The system of safeguards with which safe-deposit vaults are provided is now very complete. The mode of construction is such as to offer a very slight opportunity for entry from without by thieves. Devices by which the lock upon each safe is made different from the others, and methods for securing the complete identification of customers, have reduced to a minimum the possibility of an impostor gaining access to one of the private safes through deceit practised upon the custodian. Hence there is little chance for the company to incur liability through theft or loss of property arising from negligence on its part. Where, however, the officers of the company are called upon to exercise the greatest care and discretion, in order to protect adequately the property in their charge, is in the case of an attempt to reach the property of a depositor through process of law. The position of the company in such a case, and especially the form of process that will reach property deposited with it, are among the most important questions in connection with the business which the courts have been called upon to decide. These points have been so clearly established that those acting for the company may be sure of two things: that the extent of their duty is reached in satisfying themselves beyond question that the process is legal and regular; and that, this being so, the company is exempt from all responsibility for the subsequent acts of the officer under it.

We may now proceed to consider the steps by which these conclusions were arrived at, in the course of which it will be seen that the company cannot be subjected to garnishment or trustee process; that the only process by which property deposited with it can be reached is through seizure by the sheriff under direct attachment; also, that the company is not liable for property of third persons taken from the safe of the debtor, either as his property or because confused with his property.

The rule that the company is not subject to garnishment or trus-

tee process arises from the fact that there is no possession in the company of the property deposited in its safes. That is the distinguishing feature of this kind of bailment. The company leases a safe to a depositor, and retains the controlling or master key to the lock. The holding of this key leaves with the company the control of the access to the safe, but in no wise gives it possession of the property therein placed. The master key is retained in order to perfect the security from theft or molestation that the company undertakes to provide. The company does not obtain or desire possession of the property. That remains absolutely in the depositor.

To enable garnishment to lie against a bailee, he must have more than constructive possession, as well as custody, of the property in his charge. Thus, to quote from Waples on Attachment, Art. 453: —

"It would seem, therefore, that . . . baggage, though given to the railroad company for transportation, is still in the owner's possession. It is in much the same condition as when given to an expressman at the end of the journey to be taken to a hotel. . . . No one would think the expressman . . . subject to garnishment as the possessor of the passenger's property. . . . As the keeper of a livery stable cannot be subjected to garnishment because horses of the defendant in an attachment suit are kept in his stable, so a like temporary possession of the trunk for transportation from depot to hotel, with like liability to have the owner take possession at will, ought not to subject the carrier to garnishment should a creditor of the passenger seek to attach them. The trunks may be attached, — the horses in the livery stable may be, — but not attached in the hands of third persons under the circumstances suggested. They may be seized by the sheriff as in the hands of the defendant, and taken directly into the sheriff's custody."[1]

So, from the opinion of the court in Gregg *v.* Hilson (8 Phila. 91): —

"I think it very clear that these rented safes cannot be the subject of attachment under the Act of June 16, 1836, sect. 35, Pamph. L. 767. They are not a debt due to the defendant, or a deposit of money made by him, or goods or chattels pawned, pledged, or demised. The contents of the safe are in the actual possession of the renter of the safe; they have not been deposited with or demised to the company. I am asked to make an

[1] Hall *v.* Filter Mfg. Co., 10 Phila. 370; West. R. R. *v.* Thornton, 60 Ga. 300.

order upon the company to open the safe and file an inventory of its contents. This I am of opinion I have no power to do."

In Bottom *v.* Clarke (7 Cush. 487), where a locked trunk was deposited in the vault of a bank for safe-keeping merely, with the consent of the officers of the bank, who were ignorant of its contents and had no authority to open the trunk for the purpose of ascertaining them, it was held that neither the bank nor its officers could be charged by the trustee process either for the contents of the trunk or the trunk itself.

Garnishment, therefore, cannot be resorted to for the purpose of reaching property so deposited, and seizure by the sheriff under direct attachment remains as the only available method. That this may be used can be gathered from the paragraph quoted from Waples on Attachment and the cases cited. Beyond this, that the legality of such seizure has been upheld by the courts is shown in Roberts *v.* The Stuyvesant Safe-Deposit Company (123 N. Y. 57) and United States *v.* Graff (67 Barb. 304), in both of which cases the process was held to be regular. In the latter case, the fact that it had been held in Gregg *v.* Hilson that garnishment would not lie against a safe-deposit company was used as an argument by the court in holding that property deposited with such a company could be seized by the sheriff, on the ground that property so placed must of necessity be subject to some form of process. The reasoning of the court in this connection is very clear: —

"There was nothing improper in that part of the order made which directed the sheriff to open the safe and tin box containing the defendant's property. The process could be effectually served in no other way. It was the duty of the officer acting under it immediately to attach the real and personal estate of the debtor. And that could only be done by taking it into his custody, where the property was tangible in its character. Neither the safe nor the tin box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that against an officer acting under civil process. They were simply places of deposit and safe-keeping for the defendant's property, which the sheriff may enter to make the seizure required by law in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities or other articles, requiring but little space for their custody, and then placing them in the hands of a safe-deposit company for preservation, and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would form an

expedient for the success of fraudulent devices, which might render the laws of the State for the collection of debts entirely powerless. No such effect could be given to a deposit of that nature without at once defeating the object plainly designed to be secured by the law in rendering the debtor's property liable to the process issued in favor of his creditors in actions brought to recover their just debts. Against that, his dwelling alone is secured against the intrusive action of the officer. And that in no sense can be so extended as to include either the safe or tin box in the custody of the Mercantile Trust Company for the defendant. A case has been presented on the points relied upon by the company's counsel, supposed to be in conflict with this conclusion. It arose under the laws of Pennsylvania. And it was there held that the company could not be required to furnish a certificate of the contents of the safe, because they were virtually in the possession of the lessee. It is not necessary to consider the point whether this decision was properly made, for if it was then it is very clear that the only way in which the debtor's property held in that manner can be rendered liable to the owner's creditors is by seizure under attachment issued to the sheriff. If a certificate cannot be obtained showing the property so held for the debtor, and it cannot be seized under attachment or execution, then certainly the creditors are deprived of all means for applying it to the satisfaction of their debts. And an effectual mode would at last be discovered for enabling the debtor to withhold his property from his creditors. The law has not yet, and probably will not very soon, lend its aid to the success of such an expedient for the protection of a debtor's property against the clearly defined rights of his creditors."

The sheriff, then, must make the seizure of the property himself, and the question that at once arises is what assistance he may demand from the company.

The courts have made it very clear that the company can be compelled to take no action that would cause a breach of trust on its part. Thus, in Bottom *v.* Clark, it was held that the officers of the bank could neither open the trunk placed in their charge, for the purpose of ascertaining whether or not it contained attachable property, nor could they give the trunk over into possession of the sheriff, for the reason that they had no knowledge of its contents, and therefore could not act on a supposition in regard to them. In Gregg *v.* Hilson, on much the same grounds, the court would not permit the safe-deposit company to open a box for the purpose of disclosing its contents to officers, since the company had no possession of the property, and could consequently presume to exercise none over it.

Where, however, the assistance of the company's officers would not lead to a breach of trust, they may be compelled to give it. For the sheriff to be able to attach the property by taking it into his possession, he must of necessity know whether or not the debtor rents a safe of the company, and, if so, its location. If the officers of the company are satisfied that the writ is regular and the sheriff has a right to demand this information, they may safely give it to him. If they refuse, it may be obtained through an appeal to the court, as was done in the case of Roberts *v.* The Stuyvesant Safe-Deposit Company. The company having found that it is authorized in giving the sheriff assistance to this extent, it becomes important to know its position in relation to the subsequent acts of the officer. As far as these are concerned, the liability of the company ceases with its verification of the sheriff's authority, and he may then force the door of the safe and take possession of whatever attachable property it may contain of the debtor, — and even of third persons, where it does not admit of identification or separation, — without being guilty of trespass himself or in any way involving the company in liability.

The extent to which an officer may go, in order to make an attachment of property under a writ lawfully issued, has been clearly defined in cases that apply directly to this subject. In Burton *v.* Wilkinson (18 Vt. 186), it was held that the officer may force the door of a warehouse in order to attach property of a defendant, if he be refused admittance by those in charge of the warehouse having the keys. Also, that, if the defendant holds the goods so placed with the warehouseman by a title illegal, the latter may show the lawful seizure in excuse for not delivering them against the true owner as well as against his bailor. Following is an interesting extract from the opinion of the court covering the latter holding: —

"The wharfinger is the agent of the person of whom he receives the goods, and cannot dispute the title of his principal in an action brought by the principal against him. But this cannot protect the goods thus received from an execution against the person thus depositing them ; and if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. If the person from whom the wharfinger or warehouseman receives the goods claims the same by a title illegal, so that he cannot lawfully hold them, and they are taken by authority of the law out of the custody and care of the wharfinger, the latter may show this in excuse for not delivering them."

In the case of confusion of goods the principle is equally distinct. This is clearly expressed by the court, in the case of Wilson *v.* Lane (33 N. H. 466), as follows: —

"The question arose in this country as early as 1810 in the case of Bond *v.* Ward (7 Mass. 123), and it was held by Parsons and the court, that if the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer until notice and demand of his goods and a refusal or delay of the officer to redeliver them. In Shumway *v.* Rutter (8 Pick. 443), it was again held that, when the owner of chattels suffers them to be mixed with those of another person so that they cannot be distinguished, an officer will not be liable to an action of trespass for attaching them as the property of such other person. . . . The doctrines of these cases were fully recognized here in the case of Lewis *v.* Whittemore (5 N. H. 364), where it was held that it was the duty of the officer to attach the goods of the debtor, notwithstanding they were mixed with the goods of the plaintiff; and he had a right to take and hold the whole until the plaintiff identified his goods and demanded a re-delivery. The sheriff cannot be treated as a trespasser for doing what he has a right to do."

Recognition of the general principle governing these cases is thus shown in the opinion in Roberts *v.* The Stuyvesant Safe-Deposit Company: "It is no doubt true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of the fact to the owner," citing Bliven *v.* H. R. R. Co., 36 N. Y. 403; W. T. Co. *v.* Barber, 56 N. Y. 544; Van Winkle *v.* U. S. M. S. S. Co., 37 Barb. 122; Livingston *v.* Miller, 48 Hun, 232; Stiles *v.* Davis, 1 Black. 101.

But the same case shows that where there has been original neglect of duty on the part of the company, in allowing goods of a depositor to be removed on invalid process, the fact that the same goods were subsequently levied upon under valid process will not so cure such neglect that it may be offered in excuse by the company.

"The rule in such cases seems to be that when a bailee is sued by the owner for the conversion or negligent loss of the property bailed, it is not a defence or bar to the action to show that, after it went into the pos-

session of others, it was levied upon under process against the owner. . . . We do not think that the mere levy of an execution or attachment upon the property by a creditor of the owner, while it is in possession of the tortfeasor, is available as a defence or in mitigation. It must be shown that the owner had the benefit of it in such a way as to operate in law as a restoration of the property. None of the authorities that have been brought to our attention maintain the proposition that to show a levy alone is sufficient; and such a rule could not be supported in reason or justice."

It is, therefore, clear that both the company and the officer are protected in all proceedings conducted regularly under valid process. The further exemption of the company itself from any liability arising under the acts of the officer, after proof of his authority, is rendered complete by a significant ruling of the court in United States *v.* Graff. By this the officers and representatives of the company are not allowed to be present at the time of the opening of the safe by the sheriff; whereby the sole responsibility of the latter for his own acts is of necessity recognized. As a result of this, it follows that the company may avail itself equally with him of any defences which the law provides for his protection.

The plaintiff, in the case referred to, appealed from so much of an order made by the special term at Chambers as directed the exclusion of counsel and agents of each party at the time of opening the safe by the sheriff. The court in confirming the order ruled as follows: —

"The portion of the order from which the plaintiff has appealed was clearly right. Without it the obligation would rest upon the officer to prevent the process he was required to execute from being converted into an instrument of investigation of the debtor's private papers. Such a use of it would be an abuse requiring the punishment of the officer permitting it to be done under color of process delivered for an entirely different and lawful purpose. The order did no more than declare the duty of the officer, as the law defined it. It was a very proper exercise of the discretion of the court."

Whatever the results that the court thought it desirable to avoid thereby, it is clear that, with the exclusion of the representatives of the company, — particularly their exclusion in the character of unofficial witnesses merely, — all connection of the company with the property, in any capacity, was regarded as at an end from that time.

IV. *The Relation between Depositors having a Community of Interest in a Safe.*

Where two or more individuals rent a safe together, it is customary for them to sign an agreement on the books of the company reading somewhat as follows: "We agree to hire and hold safe No. — as joint tenants, the survivor or survivors to have access thereto in case of the death of either." In the case of Hackett *v.* Patterson (16 N. Y. Supp. 170), the court was called upon to define the nature of such a tenancy and the rights and interests of the parties in the safe. They were here regarded in the same way as co-tenants of real property, and, whether joint tenants or tenants in common, as coming within the rules governing the similar relation in the holding of real property. The plaintiffs' testator and the defendant leased a safe in the vaults of the New York Safe-Deposit Company, and, on the death of the testator, his interest in these was, with the defendant's consent, transferred to the plaintiffs on the books of the company for the period of one year. A few days before the expiration of such year, the defendant procured a renewal of the lease in his own name, to the exclusion of the plaintiffs. The receipt for rent paid by the plaintiffs stated that the safe would not be deemed to be relinquished until the keys should be returned. The plaintiffs retained the keys until some months after the expiration of the lease. It was held that the renewal, privately acquired by the defendant in his own name, inured to the benefit of the plaintiffs, his co-tenants. In rendering the opinion of the court, Bischoff, J., said: —

"The new lease constituted the plaintiffs and defendant Patterson joint lessees, and whether their relation thereunder was that of joint-tenants or tenants in common is equally immaterial in disposing of the question presented for adjudication, since either relation involves the application of the same principles of equity jurisprudence. 'Equality is equity,' and, steadily adhering to the application of this familiar maxim, courts of equity have ever regarded the rights of joint tenants and tenants in common respecting their common estate to be reciprocal, neither being permitted during the continuance of the co-tenancy furtively to acquire and hold any advantage which would not also inure to the other's benefit, provided the latter manifests a willingness to assume his just proportion of any burdens attending its acquisition and maintenance. . . . The only adequate relief was to accord plaintiffs that access to the safe to which, as beneficiaries of the leasehold interest, they were entitled,

and the exclusive jurisdiction of equity in matters of trust authorized that court to take cognizance of the action."

The mutual interests and responsibilities existing in the tenants through their community of interest in the safe is not, however, extended to the property there deposited, to the end that one tenant is supposed to have knowledge of or control over the property deposited by his co-tenant; so that, where two persons held a safe-deposit box in common, and one of them, without authority, abstracted therefrom, and transferred to an innocent purchaser for value, a certificate of stock belonging to the other, it was held that the certificate was not intrusted to the possession of the wrongdoer, either directly, indirectly, or impliedly; nor was he authorized to remove it from the box; and that, therefore, there could be no application of the rule that, where one of two innocent persons must suffer through the fraud of a third person, he must bear the loss who placed it in the power of the third person to commit the fraud.[1]

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[1] Bangor Elec. Light Co. v. Robinson, 52 Fed. Rep. 520.